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Third report on reservations to treaties

by Alain Pellet, Special Rapporteur

Addendum

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B. Persistent problems with definitions

121. As has often been stressed, the definition of reservations contained in the three Vienna Conventions on the Law of Treaties is analytical: "The Vienna Convention definition of reservations may be referred to the class of analytical definitions because it breaks down the concept of reservations into various constituents. It strives to indicate the criteria that have to be present before we may denote a class of phenomena by a single term. As an analytical definition, it would be considered to be an example of the classical *per genus proximum et differentiam specificam* definition. Reservations would belong to the class of unilateral statements made by States when signing, approving or acceding to a treaty (*genus proximum*). They are distinguished from other unilateral statements presented at these moments, by their quality of 'excluding' or 'modifying' the legal effects of certain provision of the treaty in their application to that State (*differentia specifica*)."[171]

122. In simpler terms, the Vienna definition uses both formal and procedural criteria (a unilateral statement which must be formulated at a particular time) and a substantive element (resulting from the effects intended by the State formulating it), whatever the wording adopted. Each of these elements of a definition gives rise to some problems, but they are not equally important.

1. "A unilateral statement ..."

123. The unilateral nature of reservations, as forcefully stated in the first few words of the Vienna definition, is not self-evident. Brierly, for example, took an entirely contractual approach to the concept of reservations:[172] according to the first Special Rapporteur of the Commission on the law of treaties, a reservation was indissociable from its acceptance and defined by the agreement reached on its content. In a more ambiguous way, Charles Rousseau considers that a reservation is "a *unilateral* means of limiting the effects of the treaty ... precisely on account of its legal nature – as a new offer of negotiations made to the other party or parties – it amounts to what is actually a treaty-based clause".[173] This position, which has now been completely abandoned, makes the reservation part of the treaty itself and is incompatible with the legal regime of reservations provided for in the 1969 Convention, which does not make the validity of a reservation subject to its acceptance by the other parties.

124. Although a reservation is a unilateral act separate from the treaty, however, it is not an autonomous legal act[174] in that, first of all, it produces its effects only in relation to the treaty to whose provisions it relates and to which its fate is entirely linked[175] and, secondly, its effects depend on the reaction (unilateral as well) or absence of reaction by the other States or international organizations which are parties. From this point of view, it is an "act-condition", an element of a legal relationship that it is not sufficient in itself to create. "A reservation is a declaration which is external to the text of a treaty. It is unilateral at the time

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[171] Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T. M. C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, pp. 40–41.

[172] See the text of the definition proposed in 1951, in footnote 65 above; along the same lines, see D. R. Anderson, "Reservations to multilateral conventions: a re-examination", *ICLQ*, 1964, p. 453.

[173] Ch. Rousseau, *Principes généraux de droit international public* (Paris, Pédone, 1944), vol. I, p. 290.

[174] As to the distinction between autonomous unilateral acts and acts linked to a treaty-based or customary provision, see Patrick Daillier and Alain Pellet, *Droit international public (Nguyen Quoc Dinh)* (Paris, L.G.D.J. 1994), pp. 354–357.

[175] On this point, which was a matter of debate during the consideration of the *Nuclear Tests* case in the International Court of Justice, see B (iii) below.

of its formulation; but it produces no legal effects unless it is accepted, in one way or another, by another State."[176] "A reservation is a unilateral act at the time it is formulated, but seems to stop being one in its exercise."[177] However, this takes us from the question of the definition of reservations to that of their legal regime.

125. It is no longer open to dispute at present that reservations are unilateral statements emanating either from a State or from an international organization, i.e., formal acts which are separate from the treaty itself and are not of a treaty-based nature. This is not without consequence.

126. The use of the word "*déclaration*" puts the emphasis on the formal nature of reservations.[178] Although this is not specifically stated in article 2 of the Vienna Conventions, moreover, it would be contrary to the very spirit of that institution for a reservation to be formulated orally: without taking the form of a treaty, the reservation is "grafted" onto the treaty, which is also, in principle, a formal act. It is, of course, generally agreed that purely "oral" treaties do exist,[179] but they can hardly be seen as anything more than bilateral or, in any event, synallagmatic and between a small number of States. As shown in the next section, however, unilateral statements intended to modify the effect of certain provisions of such a treaty cannot be characterized as "reservations" proper.

127. What is more, article 23, paragraph 1, of the 1969 and 1986 Conventions takes care of the problem:

> "The reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty."[180]

128. A reservation is thus an *instrumentum* which is separate from that or those constituting the treaty, it being understood that there are other ways of achieving the same result as that sought by the treaty, either through the inclusion in the treaty itself of provisions varying its application, depending on the parties,[181] or through the conclusion of a later agreement between all or some of the parties.[182] In such cases, however, reference can no longer be made to reservations: these techniques are treaty-based, while reservations are by definition unilateral.[183]

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[176] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 1984), p. 51.

[177] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux* (Paris, Pédone, 1979), p. 11.

[178] In this regard, see ibid., p. 44, and William W. Bishop Jr., "Reservations to Treaties", *Recueil des cours de l'Académie de droit international de la Haye* (hereinafter referred to as "*Recueil des cours*" ...), 1961-II, vol. 103, p. 251; the Harvard Law School draft definition defined a reservation as a "*formal* declaration" (see para. 97 above).

[179] See Paul Reuter, *Introduction au droit des traités*, 3rd edition revised and expanded by Philippe Cahier (Paris, P.U.F., 1995), p. 71, p. 27, and Sir Ian Sinclair, op. cit., p. 7.

[180] This provision will be discussed at length in the next report of the Special Rapporteur.

[181] It is in this sense, which does not have much to do with the institution of reservations as we know it, that the following extract from the dissenting opinion of Judge Zoričić to the judgement of the International Court of Justice in the *Ambatielos* case (Preliminary objection) should probably be interpreted: "A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning" (*Judgment of July 1st, 1952: I.C.J. Reports 1952*, p. 76).

[182] These techniques are considered briefly below, in section 3. For a study which (deliberately) adds to the confusion complained of here, see W. Paul Gormley, "The Modification of Multilateral Conventions by Means of 'Negotiated Reservations' and Other 'Alternatives': A Comparative Study of the ILO and the Council of Europe", *Fordham Law Review 1970–1971*, pp. 59–80 and 413–446.

[183] See Pierre-Henri Imbert, op. cit., p. 10.

129. This is certainly one of the key elements of the Vienna definition. "To some extent", it makes the reserving State "the master of the legal regime that is to exist between it and the other States".[184]

130. This point should be explained: the reservation is *always* unilateral in the sense that it has to reflect the intention of its author to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State, but this does obviously not prevent some contracting States or international organizations or some States or international organizations "entitled to become parties to the treaty"[185] from consulting one another to agree on the joint formulation of a reservation[186] (the same result is, moreover, achieved when, in expressing their consent to be bound, some States borrow the wording previously used by another reserving State): this was a common practice for the Eastern European countries until quite recently[187] and apparently still is, for the Nordic countries[188] and the States members of the European Union or of the council of Europe.[189]

131. During the discussion of the draft which was to become article 2, paragraph 1 (d), of the 1969 Convention, Paredes pointed out that a reservation could be made jointly.[190] Nothing more came of this comment and, in practice, States so far do not seem to have resorted to joint reservations.[191] This possibility cannot, however, be ruled out: the Special Rapporteur is not aware of such instruments, but a few rare examples of joint objections can be cited. For example, the European Community and its nine member States (at that time) objected in the same instrument to the "declarations" made by Bulgaria and the German Democratic Republic in connection with article 2, paragraph 3, of the TIR Convention[192] giving customs and economic unions the possibility of becoming parties.[193] In addition, while joint reservations may not exist, there have been joint declarations.[193bis] The possibility that the problem may arise in future cannot be ruled out and it would

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[184] Jules Basdevant, "La rédaction et la conclusion des traités et des instruments diplomatiques autres que les traités", *Recueil des cours* ..., 1926-V, vol. 15, p. 597.

[185] To borrow the term used in article 23 of the 1969 and 1986 Conventions.

[186] See D. W. Greig, "Reservations: Equity as a Balancing Factor?", *Australian Yearbook of International Law*, 1995, p. 26; Frank Horn, op. cit., p. 44.

[187] See, for example, the reservations of Byelorussia, Bulgaria, Hungary, Mongolia, the German Democratic Republic, Romania, Czechoslovakia and the Soviet Union to section 30 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946; some of these reservations have been withdrawn since 1989 (*Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996* (United Nations publication, Sales No. E.97.V.5), chap. III.1, pp. 38–40).

[188] See, for example, the reservations of Finland and Sweden to articles 35 and 58 of the Vienna Convention on Consular Relations of 24 April 1963 (cf. *Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chap. III.6, pp. 72–73) and those of Denmark, Iceland, Finland and Sweden to article 10 of the International Covenant on Civil and Political Rights of 16 December 1966 (ibid., chap. IV.4, pp. 123, 124 and 127).

[189] See, for example, the reservations of Germany (No. 1), Austria (No. 5), Belgium (No. 5) and France (No. 6) to the 1966 Covenant (ibid., pp. 122–123) or the declarations by all the States members of the European Community *in that capacity* to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (ibid., chap. XXVI.3, pp. 904–905).

[190] See footnote 75 above.

[191] Reservations formulated by an international organization are attributable to the organization and not to its members; they can therefore not be characterized as "joint" reservations.

[192] Customs Convention on the International Transport of Goods under Cover of TIR Carnets (Geneva, 14 November 1975), United Nations, *Treaty Series*, vol. 1079, p. 89.

[193] See *Multilateral treaties deposited with the Secretary-General – Status as at 31 December 1996*, chap. XI.A-16, p. 437.

[193bis] See para. 275 below (A/CN.4/491/Add.4).

probably be wise for the Commission to adopt a position on this point and suggest what approach should be taken in such a case.

132. It truly appears that there is nothing to be said about the joint formulation of a reservation by several States or international organizations: it is hard to see what would prevent them from getting together to do something that they can no doubt do separately and in the same terms. This flexibility is all the more necessary in that, as a result of the proliferation of common markets and customs and economic unions, it is quite likely that the above- mentioned precedent of the joint objection to the TIR Convention will be repeated in the case of reservations, since such organizations often share competence with their member States and it would be quite artificial to require those States to act separately from the union to which they belong. Theoretically, moreover, such a practice would certainly not be contrary to the spirit of the Vienna definition: a single act emanating from several States may be regarded as unilateral when its addressee or addressees are not parties to it.[194]

133. To remove any ambiguity and avoid possible problems in future, the Vienna definition should therefore be clarified as follows:

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"1.1.1. The unilateral nature of reservations is not an obstacle to the joint formulation of a reservation by several States or international organizations."

134. The principle that a reservation is a unilateral statement thus does not seem to give rise to any major practical problems and, according to the Special Rapporteur, does not call for any explanations in the Guide to Practice, subject to the exclusion of similar institutions, as proposed in section 3 below.

2. "... made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or [by a State] when making a notification of succession to a treaty ..."

135. The idea of including limits *ratione temporis* to the possibility of formulating reservations in the definition itself of reservations is not self-evident and, in fact, such limits are more an element of their legal regime than a criterion per se: a priori,[195] a reservation formulated at a time other than that provided for in article 2, paragraph 1, of the Vienna Conventions is not lawful, but that does not affect the definition of reservations.

136. Moreover, the oldest definitions of reservations usually did not contain this element *ratione temporis*: neither those proposed by Miller or Genet nor that of Anzilotti[196] put a time limit on the possibility of formulating reservations. However illogical it may be, the idea of including such a limit in the definition of reservations nevertheless gradually came to prevail for practical reasons because, as far as the stability of legal relations is concerned, there would be enormous disadvantages to a system which would allow the parties to formulate a reservation at any time. The principle *pacta sunt servanda* itself would be called into question because by formulating a reservation, a party to a treaty could call its treaty obligations into question at any time.

137. It is true that this would not be the case if the possibility of formulating reservations was made available to the signatories or to potential parties (States or international

[194] In this connection, see the first report of Mr. V. Rodriguez Cedeño on unilateral acts of States (A/CN.4/486, paras. 79 and 133).

[195] See, however, paras. 138–139 below.

[196] See paras. 94–96 above (A/CN.4/491/Add.2).

organizations "entitled to become parties" to the treaty) at any time *before* the expression of their definitive consent to be bound by the treaty or even before the entry into force of the treaty. Such freedom would, however, definitely complicate the task of the depositary and the other parties, which have to receive notification of the text of the reservation and be able to react to it within a certain time limit.[197] "The necessity of limiting the presentation of reservations to certain fixed moments became generally recognized in order to facilitate the registration and communication of reservations".[198]

138. The restrictive list in the Vienna Conventions of the times when such formulation can take place has nevertheless been criticized. On the one hand, it was considered that the list was incomplete, especially as it did not initially take account of the possibility of formulating a reservation at the time of a succession of States;[199] the 1978 Convention on Succession of States in respect of Treaties filled this gap. On the other hand, many writers pointed out that, in some cases, reservations could validly take place at times other than those provided for in the Vienna definition.[200] This apparent gap is, moreover, one of the strongest criticisms by Professor Pierre-Henri Imbert. Noting that "it may be expressly provided that reservations will be formulated at a time other than when the State signs a treaty or establishes its consent to be bound by it",[201] he suggests that an explicit addition should be made to the Vienna definition to take account of this possibility and to make it clear that the formulation of the reservation may take place "at any other time provided for by the treaty".[202]

139. This addition seems unnecessary. It is of course quite correct that a treaty may provide for such a possibility, but, subject to what is stated on this problem in the next section of this chapter, what is involved is a conventional rule or *lex specialis* which derogates from the general principles embodied in the Vienna Conventions; these principles have a purely residual character of intention[203] and in no way form an obstacle to derogations of this kind.

140. The Guide to Practice in respect of reservations being drafted by the Commission is similar in nature, and it would not be advisable to recall under each of its headings that States and international organizations may derogate therefrom by including in the treaties which they conclude clauses on reservations subject to special rules.

141. On the other hand, it may be asked whether the actual principle of a restrictive list of the times when the formulation of a reservation may take place, as in article 2, paragraph 1, of the Vienna Conventions, is appropriate. This list does not cover all the means of expressing consent to be bound by a treaty, but the spirit of this provision is that the State may indeed formulate (or confirm) a reservation when it expresses such consent and this is the only time at which it may do so. It is therefore obvious that too much importance

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[197] See article 23 of the 1969 and 1986 Conventions. The formal and temporal limits to the formulation of reservations will be the subject of the Special Rapporteur's next report.

[198] Frank Horn, op. cit., p. 35.

[199] Cf. Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Yearbook of International Law*, 1970, p. 295.

[200] Ibid.; see also Giorgio Gaja, "Unruly treaty reservations", *Le droit international à l'heure de sa codification – Études en l'honneur de Roberto Ago* (Milan, Giuffrè, 1987), vol. I, pp. 310–313; D. W. Greig, "Reservations: equity as a balancing factor?", *Australian Yearbook of International Law 1995*, pp. 28–29; Frank Horn, op. cit., pp. 41–43; and Paul Reuter, op. cit., p. 71.

[201] Pierre-Henri Imbert, op. cit., 1979, p. 12.

[202] Ibid., p. 18; see the full text of the definition proposed by this writer, para. 103 above (A/CN.4/491/Add.2).

[203] See the second report on reservations to treaties (A/CN.4/477/Add.1), paras. 133 and 163.

should not be attached to the letter of this list, failing as it does to correspond to the list in article 11 of the 1969 and 1986 Conventions,[204] which should have served as a model.

142. Moreover, the Commission and its Special Rapporteur had foreseen the problem during the discussion of the draft articles on the law of treaties between States and international organizations or between international organizations. Ultimately, however, since the Commission was anxious to keep as closely as possible to the 1969 text, it modelled its draft on that text and thereby rejected a helpful simplification.[205]

143. This problem, which so far does not appear to have given rise to any practical difficulty, but which might do so (when reservations are formulated at the time of an exchange of letters, for example), certainly does not justify a proposal by the Commission that the Vienna Conventions should be amended. Nonetheless, it should probably be specified in the Guide to Practice that:

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"1.1.2. A reservation may be formulated by a State or an international organization when that State or that organization expresses its consent to be bound in accordance with article 11 of the 1969 and 1986 Conventions on the Law of Treaties."

144. In addition, one specific point needs to be flagged. It may happen that the territorial scope of a treaty will vary over time because the territory of a State changes or because a State decides to extend the application of the treaty to a territory which has been placed under its jurisdiction and to which the treaty did not formerly apply.[206] On that occasion, the State which is responsible for the international relations of the territory may notify the depositary of new reservations in respect of that territory in its notification of the extension of the territorial application of the treaty.

145. This has recently occurred at least twice:

(a) On 27 April 1993, Portugal notified the Secretary-General of its intention to extend to Macao the application of the two 1966 international covenants on human rights. This notification included reservations in respect of that territory;[207]

(b) Likewise, on 14 October 1996, the United Kingdom notified the Secretary-General of its intention to apply to Hong Kong the Convention of 18 December 1979 on the Elimination of All Forms of Discrimination against Women, subject to a number of reservations.[208]

The other Contracting Parties to these instruments neither reacted nor objected to this procedure.

146. This practice inevitably has an impact on the actual definition of reservations because it incorporates clarifications relating to the time of their formulation. It therefore seems

[204] Article 11 of the 1986 Vienna Convention: "1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. 2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed".

[205] See A/CN.4/491/Add.1, paras. 75–77.

[206] On this point, see paras. 183 ff. below.

[207] See *Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chap. IV.3, p. 118, note 16.

[208] Ibid., chap. IV.8, p. 183.

prudent to specify, as, incidentally, has been suggested by various writers on the subject,[209] that a unilateral statement made by a State at the time of a notification of territorial application constitutes a reservation if, in all other respects, it fulfils the conditions laid down by the Vienna definition. It goes without saying that a clarification of this kind is without prejudice to any problem relating to the permissibility of such reservations.

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"1.1.3. A unilateral statement which is made by a State at the time of the notification of the territorial application of a treaty and by which that State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to the territory in question constitutes a reservation."

3. "... whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization"

147. It is undeniably the third component of the Vienna definition which has given rise to the greatest problems and the liveliest theoretical debates. While no one questions their principle and it is generally recognized that the function of reservations is to purport to produce legal effects, the definition of these effects and their scope are still a matter of controversy. "The *differentia specifica*[210] of the Vienna Convention definition, intended to clarify the 'essence' of the very criteria of reservations, in fact gave birth to new problems that had not been conceived of originally. How do reservations relate to the treaty text, and how do they affect the treaty norms? How do reservations actually change the relations between the reserving State and the confronted States? These questions bring into focus the meaning of expressions used in the definition of 'reservations' such as '... legal effect of certain provisions', '... in their application to the [i.e., *the reserving*] State ...', 'excludes' and 'modifies'. All these expressions, which, according to the requirements for the terms used in the definition, are supposed to be simple and clear, are in fact imprecise".[211]

148. Essentially, "a reservation is a particularity which a State wishes to introduce in relation to a treaty to which it nevertheless expresses its intention to be bound",[212] and this "particularity" is expressed in legal terms: the reserving State is not in the same situation, in respect of the treaty, as the other contracting States, as a result of the modification of the legal effect of some of the provisions of the treaty.

149. It goes without saying, although it has rarely been pointed out,[213] that this criterion should be juxtaposed with article 21 of the 1969 and 1986 Vienna Conventions, which defines the legal effects of reservations.[214] Put another way, the formulation of a reservation

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[209] Cf. Renata Szafarz, loc. cit., p. 295.

[210] On this concept, see above, para. 121.

[211] Frank Horn, op. cit., p. 45.

[212] Suzanne Bastid, *Les traités dans la vie internationale – Conclusion et effets* (Paris, Economica, 1985), p. 71.

[213] See, however, Rosario Sapienza, *Dichiarazioni interpretative unilaterali e trattati internazionali* (Milan, Giuffrè, 1996), pp. 150–151.

[214] Article 21, paragraph 1, of the 1969 Convention states: "A reservation established with regard to another party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with the other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and (b) modifies those provisions to the same extent for that other party in its relations with the reserving State".

purports to bring about the consequences which are described by that provision, on the subject of which it is not unimportant to note that, contrary to article 2, paragraph 1 (d):

First, it makes no distinction between exclusion and modification (whereas the definition makes clear that the object of a reservation is to "exclude" or "modify"); and

Secondly, it appears to admit that modification affects the provisions of the treaty to which the reservation itself relates (whereas article 2, paragraph 1 (d), deals with the exclusion or modification *of the legal effect* of those provisions);

Thirdly, however, both articles emphasize the fact that the reservation relates to *certain provisions* of the treaty and not to the treaty itself.

150. These clarifications should be borne in mind if an interpretation is required of the definition contained in article 2, paragraph 1, to which the "general rule of interpretation" embodied in article 31 of the 1969 Convention applies: article 21 is a component of the general context of which the terms to be interpreted form part.

a. Modification of the effect of the treaty or its provisions?

151. Having made this point, the first issue to be considered is the effect of reservations on the treaty: do they modify[215] the treaty itself, its provisions or the obligations deriving from it?

152. One writer who has raised this question, in a different form and with some vehemence, is Professor Pierre Henri Imbert. According to him, "it is precisely the link which the drafters of the Vienna Convention established between reservations and the provisions of a convention which seems to be most open to criticism because a reservation does not eliminate a *provision*, but an *obligation*".[216]

153. The Special Rapporteur does not believe that this criticism is justified. First of all, it prejudges the answer to another basic question that relates to "extensive"[217] reservations. Secondly, it is contrary to the letter both of article 2, paragraph 1 (d), and article 21. Although, the drafters of the Conventions were not always entirely consistent, they referred expressly in both cases *to the provisions* of the treaty rather than directly *to the obligations* deriving therefrom. There is good reason for this. Moreover by focusing on the "*legal effect* of certain provisions of the treaty", the danger of taking an overly categorical stance on the thorny issue of "extensive" reservations is avoided, but the same result is achieved: a reservation modifies not the provision to which it relates, but its legal effect, which, in most cases, takes the form of an obligation.

154. In this respect, article 2, paragraph 1 (d), of the 1969 and 1986 Conventions is better drafted than article 21, paragraph 1. It is unclear how a reservation, which is an instrument *external* to the treaty, could modify *a provision of that treaty*. It might exclude or modify its application, i.e. its effect, but not the text itself, i.e. the provision.

155. However, Professor Imbert raises another, perhaps more serious matter: "The words 'certain provisions' strike me as not particularly apt, insofar as they do not paint a complete picture. Their use is prompted by the praiseworthy desire to rule out reservations which are too general and imprecise (comment by the Government of Israel on the International Law Commission's first draft, *Yearbook ... 1965*, vol. II, p. 115; statement by the representative

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[215] For the purposes of this first part of the discussion, the word "modify" is interpreted in a broad and neutral sense and includes the idea of exclusion.

[216] Pierre-Henri Imbert, op. cit., p. 15; emphasis added in the original.

[217] See below, paras. 209 ff.

of Chile at the first session of the Vienna Conference (A/CONF.39/11/C.1/SR.4, para. 5) and which ultimately result in the complete negation of the compulsory nature of the treaty (cf. the often cited reservation by the United States of America to the General Act of Algeciras of 7 April 1906.[218]) It may be asked however, whether article 2 was the right place to bring up this matter, which actually relates to the validity of reservations. The fact that a statement entails improper consequences should not prevent it from being regarded as a reservation (this is, for example, the case with reservations by which States subordinate, in a general and indeterminate manner, the application of a treaty to respect for national legislation). Moreover, practice abounds in examples of reservations which are perfectly valid even though they do not relate to specific provisions; they exclude the application of the treaty as a whole in well defined cases".[219]

156. This is true. As other writers have indicated,[220] practice certainly departs from the letter of the Vienna definition in the sense that many reservations relate not to specific provisions of the treaty, but to the entire instrument itself. There are countless examples; a few will suffice to illustrate this trend:

(a) When ratifying the International Covenant on Civil and Political Rights, one of the reservations formulated by the United Kingdom was as follows:

> "The Government of the United Kingdom reserves the right to apply to members of and persons serving with the armed forces of the Crown and to persons lawfully detained in penal establishments of whatever character such laws and procedures as they may from time to time deem to be necessary for the preservation of service and custodial discipline and their acceptance of the provisions of the Covenant is subject to such restrictions as may for these purposes from time to time be authorized by law".[221]

(b) When ratifying the Convention of 10 December 1976 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Austria formulated the following reservation:

> "Considering the obligations resulting from its status as a permanently neutral State, the Republic of Austria declares a reservation to the effect that its cooperation within the framework of this Convention cannot exceed the limits determined by the status of permanent neutrality and membership with the United Nations".[222]

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[218] "... in acquiescing in the regulations and declarations of the conference, in becoming a signatory to the General Act of Algeciras and the Additional Protocol, ... and in accepting the application of those regulations and declarations to American citizens and interests in Morocco, [the Government of the United States of America] does so without assuming obligation or responsibility for the enforcement thereof." (*Acta Général de la Conférence Internationale d'Algéciras, The Consolidated Treaty Series* (Dobbs Ferry, NY, Oceana Publications, Inc., 1980), vol. 201, p. 67).

[219] Pierre-Henri Imbert, op. cit., pp. 14–15; footnotes are reproduced only partially in brackets.

[220] See, for example, Renata Szafarz, loc. cit., p. 296. See, however, Daniel N. Hylton, "Default breakdown: the Vienna Convention on the Law of Treaties' inadequate framework on reservations", *Vanderbilt Journal of Transnational Law*, 1994, p. 422.

[221] *Multilateral Treaties Deposited with the Secretary-General - Status as at 31 December 1996*, chap. IV. 4, p. 129.

[222] Ibid., chap. XXVI.1, p. 892. Along the same lines, see, for example, the similarly conceived reservations of Austria and Switzerland to the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Swiss reply to the questionnaire on reservations).

(c) When signing the Final Acts of the Regional Administrative Conference for the Planning of the Maritime Radionavigation Service (Radiobeacons) in the European Maritime Area in 1985, the delegation of France reserved

> "its Government's right to take whatever action it may consider necessary to ensure the protection and proper operation of its maritime radionavigation service, which uses the phase measurement multifrequency system".[223]

(d) In its reply to the questionnaire on reservations, Argentina noted that it had formulated the following reservations when it ratified the International Telecommunications Convention of 6 November 1982:

> "I. The Delegation of the Argentine Republic reserves for its Government the right not to accept any financial measure which may entail an increase in its contribution;
>
> "II. To take any such action as it may consider necessary to protect its telecommunication services should Member countries fail to observe the provisions of the International Telecommunications Convention (Nairobi, 1982)".

None of the other contracting States or States entitled to become parties to these treaties raised any objection to these reservations.

157. There is no doubt that the practice of formulating "across-the-board" reservations relating not to specific provisions of the treaty, but to its provisions as a whole, is contrary to the letter of the Vienna definition. But the sheer number and consistency of such reservations, together with the lack of objections to them in principle, reflect a social need which it would be absurd to challenge in the name of abstract legal reasoning.[224] Moreover, the interpretation of legal norms cannot remain static. Article 31, paragraph 3, of the Vienna Convention itself invites the interpreter of a conventional rule to take account "together with the context [...] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and, as the International Court of Justice has clearly stated, a legal principle should be interpreted in the light of "the subsequent development of law ...".[225]

158. In order to dispel ambiguity and avoid any controversy, it would therefore seem both reasonable and helpful in the Guide to Practice to use the broad interpretation which States actually give to the ostensibly restrictive wording of the Vienna definition on the anticipated effect of reservations. Needless to say, this kind of precise definition in no way prejudges the permissibility (or impermissibility) of reservations: whether they relate to certain provisions of a treaty or to the treaty as a whole, they are subject to the substantive rules on the validity (or permissibility) of reservations.[226]

159. In the light of these considerations, it is proposed that the Guide to Practice should state:

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[223] Document annexed to the reply by France to the questionnaire on reservations.

[224] It should also be stressed that, if the terms used in the Vienna definition were to be taken literally, it would be unnecessary to include a clause in certain treaties expressly prohibiting general reservations as is done by art. 64, para. 1, of the European Convention on Human Rights. This relatively common practice continued after the adoption of the 1969 Vienna Convention.

[225] *Legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970), Advisory Opinion of 21 June 1971: I.C.J. Reports 1971*, p. 31.

[226] This central question should constitute the subject of the fourth report on reservations to treaties. See also paras. 416–418 below and draft guideline 1.4.

Guide to Practice

"1.1.4. A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which the State or the international organization intends to implement the treaty as a whole."

160. It would, however, appear self-evident that a reservation cannot produce effects outside the sphere of treaty relations established by a given treaty: as it is not an "autonomous" unilateral act, it is linked to the treaty in respect of which it is made.

161. This was indirectly questioned by France in connection with the *Nuclear Tests* case in 1974: in France's view, the reservations it had linked to its statement of acceptance of the Court's optional jurisdiction rebounded, as it were, on the General Act for the Pacific Settlement of International Disputes, an earlier treaty also covering the judicial settlement of disputes.[227] In view of the reasoning adopted by the Court, it did not take a decision on this claim, but it was meticulously refuted in the joint dissenting opinion of four Judges; after citing paragraph 1 (d) of the Vienna Convention on the Law of Treaties *in extenso*, they add:

> "Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations."[228]

162. In fact, this observation appears to be so clear and undeniable and is such an inevitable consequence of the general definition of reservations that it does not seem necessary to devote a paragraph of the Guide to stating the obvious.

b. Exclusion, modification or limitation of the legal effect of the provisions of a treaty?

163. Basing itself on the definition given in article 2, paragraph 1 (d), of the 1969 Vienna Convention, the European Commission of Human Rights found, in the *Temeltasch* case,

> "[This interpretation] attaches decisive importance only to the material part of the definition, i.e. the exclusion or alteration of the legal effect of one or more specific provisions of the treaty in their application to the State making the reservation".[229]

164. This was also the position of the Arbitral Court set up for the purpose of settling the Franco-British dispute over the delimitation of the continental shelf of the Mer d'Iroise. But the Court, also taking article 2, paragraph 1 (d), as its basis, provided an important clarification, perfectly in keeping with the letter of the text, which it merely paraphrased:

> "This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude

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[227] See discussion of the French argument in the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock attached to the Judgment of 20 December 1974 (New Zealand v. France) *I.C.J. Reports 1974*, p. 347.

[228] Ibid., p. 350.

[229] Decision of 5 May 1982, *Decisions and Reports* of the European Commission of Human Rights, vol. 31, April 1983, para. 71, p. 146.

or modify the *legal effect* of certain provisions in their application to the reserving State".[230]

165. Beyond divergences over details (but not necessarily insignificant ones, as we shall see below), there is a broad consensus, in both the writings of jurists and legal decisions, to the effect that a reservation has been made when a unilateral statement "purports to derogate from a substantive provision of the treaty".[231]

166. This broad consensus leaves aside the question of the strength of the "dispensatory" effect of the reservations. The Vienna definition provides the following clarification: in entering its reservation, the State "purports to exclude or to modify the legal effect [of certain provisions][232] of the treaty in their application to that State". But this "clarification" in turn raises a few difficult problems.

167. It does, however, highlight the fact that the reservation must be meant to have an effect on the application of the treaty itself. This excludes the following, in particular:

Conditional ratifications, i.e. conditions placed by a State on the entry into force of a treaty in its application to that State, which, when fulfilled, cause the treaty to apply in its entirety;[233] and

Interpretative declarations;[234]

but also

Statements, generally called "reservations" by their authors, which neither have nor purport to have an effect on the treaty or its provisions and can not be qualified as interpretative declarations as they also do not interpret or purport to interpret the treaty, with which they simply have no direct relationship.

c. Reservations relating to "non-recognition"

168. The clearest examples of this type of statement are the "reservations relating to non-recognition",[235] or, at least, some of them.

169. States very frequently link the expression of their consent to be bound to a statement in which they indicate that this expression of consent does not imply the recognition of one or more of the other contracting parties or, in a more limited way, of certain situations, generally territorial, relating to one or more of the other parties.

170. Mr. Horn categorically states that not all such statements are reservations, because of the practical problems that would entail, but he does feel that they exclude "the

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[230] Arbitral decision of 30 June 1977, case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, *United Nations Reports of International Arbitral Awards* (hereinafter *UNRIAA*), vol. XVIII, para. 55, p. 40.

[231] Council of Europe, Committee of Legal Advisers on Public International Law (CAHDI), "Questions soulevées par les réserves – Réunion tenue à Vienne le 6 juin 1995; résumé et suggestions de la délégation autrichienne", Strasbourg, 13 September 1995, CADHI (95) 24, para. 2.4, p. 4.

[232] On the meaning of the square brackets, see draft paragraph 1.1.4 of the Guide to Practice, para. 159 above.

[233] See William W. Bishop Jr., "Reservations to Treaties", *Recueil des Cours* ..., 1961-II, vol. 103, pp. 304–306; Frank Horn, op. cit., pp. 98–100, and the examples given.

[234] See paragraph 3 below.

[235] Concerning which Professor Joe Verhoeven has rightly pointed out that they are in some respects very different from the reservations, in the strict sense of the term, found in the law of treaties (*La reconnaissance internationale dans la pratique contemporaine* (Pédone, Paris, 1975), p. 341, footnote 284).

implementation of the whole norm system" provided for by the treaty.[236] Similarly, Marjorie Whiteman, reflecting what appears to be the position of the majority of legal writers,[237] is of the view that "[i]t is questionable whether a statement on this subject, even when designated as a reservation, constitutes a reservation as generally understood since it does not purport, in the usual circumstances, to amend or modify any substantive provision of the treaty".[238]

171. In the opinion of the Special Rapporteur, things are less simple. He is far from certain that the general category of "reservations relating to non-recognition" exists; it is a convenient heading, but one which covers some very diverse situations.

172. The following is one example: in accordance with the usual (but not constant) practice of the Arab States, Saudi Arabia made the following statement on signing the Agreement establishing the International Fund for Agricultural Development (IFAD):

> "The participation of the Kingdom of Saudi Arabia in the Agreement shall in no way imply recognition of Israel and shall not lead to entry into dealings with Israel under this Agreement".[239]

173. This statement contrasts with that of the Syrian Arab Republic on the same occasion:

> "It is understood that the ratification of this Agreement by the Syrian Arab Republic does not mean in any way recognition of Israel by the Syrian Arab Republic".[240]

174. The Syrian statement corresponds to what might be considered a "precautionary step": its author is anxious to point out that he does not recognize Israel and that the ratification of the constituent instrument of IFAD (on which both parties will sit) does not imply a change in attitude. This adds nothing to existing law, since it is generally accepted that participation in the same multilateral treaty does not signify mutual recognition, even implicit.[241] Even if that were not the case,[242] it would not mean that the statement was a

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[236] Frank Horn, op. cit., pp. 108–109.

[237] On this point, see in particular B. R. Bot, *Non-Recognition and Treaty Relations* (Leyden, Sijthoff, 1968), pp. 30–31, 132–139 and 252–254; M. Lachs, "Recognition and modern methods of international cooperation", *British Yearbook of International Law 1959*, pp. 252–259; H. Lauterpacht, *Recognition in International Law* (Cambridge, Cambridge University Press, 1947), pp. 369–374; and J. Verhoeven, op. cit., pp. 428–448.

[238] Marjorie M. Whiteman, *Digest of International Law*, vol. 14, 1970, p. 158.

[239] *Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chap. X.8, p. 395; see also the statements of Iraq and Kuwait, couched in similar terms, ibid., pp. 414–415.

[240] Ibid., p. 415. See also the Syrian Arab Republic's first, albeit slightly more ambiguous, statement, in respect of the Vienna Convention on Diplomatic Relations, ibid., chap. III.3, p. 58: "The Syrian Arab Republic does not recognize Israel and will not enter into dealings with it". The statement made by Argentina on acceding to the Convention relating to the Status of Stateless Persons on 28 September 1954 is not in the least ambiguous: "The application of this Convention in territories whose sovereignty is the subject of discussion between two or more States, irrespective of whether they are parties to the Convention, cannot be construed as an alteration, renunciation or relinquishment of the position previously maintained by each of them" (ibid., chap. V.3, p. 242); this example is an interesting one for the issue is the recognition not of a State or Government, but of a situation (see also Spain's statements concerning the 1958 Geneva Conventions on the Law of the Sea in respect of Gibraltar, ibid., chaps. XXI.1, p. 803, XXI.2, p. 809, XXI.3, p. 813 and XXI.4, p. 816).

[241] See J. Verhoeven, op. cit., pp. 429–431. Kuwait clearly reaffirms this in the statement it made on acceding to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid: "It is understood that the accession of the State of Kuwait to the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the United Nations General Assembly [on 30 November 1973] does not mean in any way recognition of Israel by the State of

reservation: the Syrian statement does not purport to have an effect on the treaty or its provisions.

175. This is in striking contrast to the Saudi statement, which expressly excludes any treaty relations with Israel. In this case, it is indeed the application of the treaty that is excluded.[243] We find the same contrast, for example, between the reactions of Australia and Germany to the accession of certain States to the 1949 Geneva Conventions. While repeating its non-recognition of the German Democratic Republic, the Democratic People's Republic of Korea, Viet Nam and the People's Republic of China, Australia nevertheless "notes their acceptance of the provisions of the Conventions and of their intention to apply the said provisions".[244] Germany, however, excludes any treaty relations with South Viet Nam.[245]

176. In this connection, it has been stated that such statements would still not be reservations, since "reservations imply a modification of the operation of obligations and rights *ratione materiae* but not *ratione personae* nor *ratione loci*".[246] This distinction, which is not based on the text of the Vienna definition, is quite artificial: the principle is that, when a State or an international organization becomes party to a treaty, that State or that international organization is linked by all of its provisions to all of the other parties; this is the very essence of the *pacta sunt servanda* principle. By refusing to enter into treaty relations with one of the States parties to the constituent instrument of IFAD, Saudi Arabia is indeed seeking to exclude or to modify the legal effect [of certain provisions] of the treaty in their application to it. This can give rise to serious practical difficulties, especially when the constituent instrument of an international organization is involved,[247] but there is no reason why such a statement should not be qualified as a reservation.

177. The same is true of the less typical reservation by which the United States maintains that its participation in the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed in Geneva on 13 July 1931:

> "... does not involve any contractual obligation on the part of the United States of America to a country represented by a regime or entity which the Government of the United States of America does not recognize as the government of that country until such country has a Government recognized by the Government of the United States of America".[248]

This is in contrast to Cameroon's statement concerning the Partial Nuclear Test-Ban Treaty of 5 August 1963, which is also drafted in general terms, but which does not seek to produce effects on the relations established under the Treaty:

Kuwait" (*Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chap. IV.7, p. 166).

[242] That is, if participation in the same multilateral treaty did imply mutual recognition.

[243] And, for the reasons explained above, in paras. 31–40, a statement purporting to exclude the effects of a treaty as a whole is indeed a reservation.

[244] International Committee of the Red Cross (ICRC), *Geneva Conventions of 12 August 1949 for the Protection of War Victims – Reservations, declarations and communications made at the time of or in connection with ratification, accession or succession* (DOM/JUR/91/1719-CRV/1), p. 13.

[245] "... the Federal Government does not recognize the Provisional Revolutionary Government as a body empowered to represent a State and [...] accordingly is not able to consider the Provisional Revolutionary Government as a Party to the Geneva Conventions of 12 August 1949" (ibid., p. 6).

[246] Frank Horn, op. cit., p. 109.

[247] Curiously, Israel objected to the Syrian statement (*Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chap. X.8, p. 396, note 11) but does not appear to have reacted to the reservations of Saudi Arabia, Iraq and Kuwait.

[248] Ibid., p. 268: it may be noted that the issue here is non-recognition of a Government (the United States was referring to El Salvador) rather than of a State.

"Under no circumstances could the signing by the Federal Republic of Cameroon have the effect of entailing recognition by Cameroon of Governments or regimes which, prior to such signing, had not yet been recognized by the Federal Republic of Cameroon according to the normal traditional procedures established by international law".[249]

178. The analysis proposed above follows from the Vienna definition, as interpreted by draft paragraph 1.1.4 of the Guide to Practice.[250] Nevertheless, it does not seem pointless to make it clear in the Guide that "reservations relating to non-recognition" are not always genuine reservations within the meaning of the law of treaties. To avoid any ambiguity, which is a potential source of difficulty, it would be desirable to specify that a statement of non-recognition is in fact a reservation if the author stipulates that it partly or wholly excludes the application of the treaty between the author and the State(s) it does not recognize, whereas, *a contrario*, a statement of non-recognition does not constitute a reservation if the State making it does not intend it to produce a legal effect in its treaty relations with the State(s) it does not recognize.

179. Two problems arise, however. First, statements of this type can be made at the time the author State expresses its consent to be bound[251] and, in that case, the *ratione temporis* criterion required under the Vienna definition for a reservation to exist[252] is fulfilled; there is then no difficulty in regarding such statements as genuine reservations. But such statements may also be made by States already bound by the treaty, in response to accession by another State party.[253] From a literal reading of article 2, paragraph 1 (d), of the 1969 Vienna Convention, it is not possible to talk here of reservations proper because they are made *after* the final expression of consent of the author to become a party. This would, however, be an extremely formalistic view: such statements are made under exactly the same terms and produce exactly the same effects as reservations relating to non-recognition made "within the time limit". It therefore seems justifiable to label them as reservations regardless of when they are made (here too, without in any way prejudging their validity).

180. Secondly, it is not uncommon in the law of treaties,[254] including reservations,[255] for the basis to be not the expressly declared will but an implicit intention which is apparent from circumstances. In that case, it would be possible to admit that, in the event of silence in the statement or ambiguity regarding the legal effects it is designed to achieve, the author's intention can be inferred from the circumstances. In the opinion of the Special Rapporteur, it is preferable to dismiss such a solution. The practice regarding "reservations relating to non-recognition" is abundant and States seem to be quite careful in modulating

[249] Similarly, see the statement by Benin in connection with the same treaty (*Status of Multilateral Arms Regulation and Disarmament Agreements, Fifth Edition, 1996* (United Nations publication, Sales No. E.97.IX.3), p. 40) or the one by the Republic of Korea when it signed the Convention on Biological Weapons of 10 April 1972 (ibid., p. 176).

[250] See para. 40 above.

[251] See paras. 169–174 above.

[252] See (ii) above.

[253] See the "declaration" made by Germany on 29 March 1974 concerning accession by the Provisional Revolutionary Government of the Republic of South Viet Nam to the Geneva Conventions of 12 August 1944 (ICRC, *Geneva Conventions of 12 August 1949 for the Protection of War Victims – Reservations, declarations and communications made at the time of or in connection with ratification, accession or succession*, p. 6).

[254] Cf. article 12, paragraph 1 (c), article 14, paragraph 1 (d), article 40, paragraph 5, article 29 and article 45 (b) of the Vienna Convention on the Law of Treaties.

[255] Cf. article 20, paragraph 2, of the Convention.

their wording in terms of their aim. In any event, since the objective is to remove any ambiguity, it is definitely desirable for States[256] to specify their intention.

181. A provision of this kind, included in the Guide to Practice, could be such as to encourage them:

Guide to Practice

"*1.1.7.*[257] *A unilateral statement by which a State purports to exclude the application of a treaty between itself and one or more other States which it does not recognize constitutes a reservation, regardless of the date on which it is made.*"

d. Reservations having territorial scope

182. The question of reservations having territorial scope may be seen in rather similar terms.

183. These are statements whereby a State excludes the application of a treaty which it signs,[258] or some of its provisions,[259] to one or more territories under its jurisdiction because they form an integral part of its own territory, because they are Non-Self-Governing Territories or because it is competent in some other respect to act on behalf of that territory in its international relations.

184. In the past, such reservations consisted primarily of what were called "colonial reservations", i.e., declarations by which administering Powers made known their intention to apply or not to apply a treaty or certain of its provisions to their colonies or to certain of their colonies. Commenting in 1926 on the reservations of this type made by France and Great Britain to the 1912 Opium Convention, H. W. Malkin expressed the view that "[t]hese two 'reservations' were really not reservations in the ordinary sense, but were rather

[256] It appears to be a very marginal problem in the case of international organizations, but could nonetheless arise in the case of international integration organizations (European Union).

[257] For reasons of internal logic, it seemed preferable to include this paragraph, which deals with a particular category of [non-]reservations, at the end of the section of Guide to Practice on the definition of reservations.

[258] See, for an old example, the statement by Denmark when it ratified the Convention of 7 June 1930 for the Settlement of Certain Conflicts of Law in connection with Bills of Exchange and Promissory Notes (*Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chap. II.8, p. 969), and, for a more recent example, those by the United Kingdom excluding the application of the 1958 Geneva Conventions on the Territorial Sea and the Contiguous Zone, on the High Seas and on High Seas Fisheries to the "States in the Persian Gulf" (ibid., chaps. XXI.1, p. 803; XXI.2, p. 809 and XXI.3, p. 813). As curiosities, see also reservations that the United Kingdom formulated when it acceded to many treaties further to the unlawful proclamation of independence of Southern Rhodesia between 1965 and 1980 (cf. the British reservations to the two Covenants of 1966 ["... the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed [by the Covenant] in respect of that territory can be fully implemented"] (ibid., chaps. IV.3 and IV.4, pp. 115, 129 and 137) and the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 (ibid., chap. IV.2, p. 101) or the total exclusion by the United States from all of its territory of transport governed by the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for Such Carriage (ATP) of 1 September 1970 (objections were made to this reservation by France and Italy) (ibid., chap. XI.B-22, pp. 611).

[259] See, for example, the carefully limited reservations of the United Kingdom regarding the application to Fiji of 1966 Convention on Racial Discrimination (ibid., chap. IV.2, p. 101; these reservations were confirmed by Fiji in its declaration of succession, ibid., p. 97) and the many reservations included in the notification by Portugal of the application of the human rights covenants to Macao (ibid., chap. IV.3, footnote 16, p. 118).

excluding declarations as regards colonies. In ordinary cases no question of the consent of the other signatories arises as regards such declarations".[260]

185. Whatever might have been the situation at the time, this conclusion is highly debatable today in the light of the Vienna definition: these are definitely reservations in the strict sense of the term; these unilateral statements, made by a State when expressing its formal consent to be bound, purport to exclude the legal effect of the treaty or of certain of its provisions in their application to that State.

186. Curiously, modern-day legal writers continue to express doubts in this connection. Mr. Horn, for example, is of the view that "[t]he question whether a statement bearing upon the implementation *ratione loci* of a treaty by excluding certain territories from the application of the treaty constitutes a reservation cannot be answered without analysing the object of the treaty and the effect of such a territorial statement upon its operation. Does the statement really change the legal effect of the treaty obligations and the corresponding rights? Do the confronted States have to face any encroachment on their legal position due to the territorial statement?"[261]

187. This excellent specialist in reservations has given a complicated answer to these questions. According to him, such territorial statements would constitute genuine reservations only if the object of the treaty in question is effectively territorial (for example, the creation of a demilitarized zone) or if it contains an express provision that it applies to the entire territory of the States parties or to a part of the territory expressly covered by the treaty.[262] Actually, it is difficult to see the justification for such subtleties. Under the terms of article 29 of the 1969 Vienna Convention:

> "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

Accordingly, only if the treaty itself *excluded* some territories from its scope and the territorial statement was confined to reproducing this provision could such a statement, devoid of any legal effect, be regarded as a reservation. In all other cases, the author of the territorial statement does purport to exclude the legal effect of the treaty or some of its provisions (legal effect determined by the law of treaties),[263] in their application to that State, which brings us back to the Vienna definition.

188. It is true, however, that article 29 of the Vienna Convention leaves open the question of the definition of the territory of the State. Are Non-Self-Governing Territories (within the meaning of Chapter XI of the Charter of the United Nations) or territories which have broad internal autonomy, but do not themselves handle their international relations (for instance, the Faeroe Islands and Greenland in relation to Denmark), to be considered as forming part of the territory of the State for the purposes of the law of treaties? This report is not the appropriate place to try and answer this delicate question and, in all likelihood, there is no point in trying to do so in order to define reservations.[264] It is enough to consider that, *if*, under either its own provisions or under the principles of general international law, a treaty applies to a particular territory that the declaring State intends to exclude from the

[260] H. W. Malkin, "Reservations to Multilateral Conventions", *British Yearbook of International Law, 1926*, p. 103.

[261] Frank Horn, op. cit., pp. 100–101.

[262] Ibid., p. 101.

[263] The same is obviously true when the possibility of such reservations is allowed for in the treaty itself (see the examples of such territorial reservations clauses in P.-H. Imbert, op. cit., pp. 236–237).

[264] See, however, the way in which P.-H. Imbert (ibid., p. 17) and F. Horn, (op. cit., pp. 101–103) deal with the problem.

application of the treaty, the statement is indeed in the nature of a reservation, since it purports to prevent the treaty from producing its effects in respect of a territory to which it would normally be applicable. It goes without saying that here, too, this clarification, which relates purely to the definition of a reservation, does not prejudge the permissibility (or impermissibility) of such a reservation; it simply means that the rules applicable to reservations to treaties are applicable to such statements.

189. In addition, as in the case of reservations relating to non-recognition,[265] such statements can be made either when the State expresses its formal consent to be bound or, but only in the case of partial reservations,[266] relating to territory, when giving notification of the treaty's application to a territory.[267] This feature should be taken into account in the definition of this type of reservation.

190. In the opinion of the Special Rapporteur, these clarifications should appear in the Guide to Practice:

Guide to Practice

"1.1.8. A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation, regardless of the date on which it is made."

e. Other reservations purporting to exclude the legal effect of the provisions of the treaty

191. Reservations relating to non-recognition (when they are genuine reservations) and reservations having territorial scope represent sub-categories of reservations belonging to the more general category of reservations purporting to *exclude* the legal effect of the treaty or of certain of its provisions.[268] In formulating a reservation of this kind, the State or the international organization intends to "neutralize" one or more provisions of the treaty. It maintains[269] the *status quo ante*.

192. This does not necessarily mean complete freedom to act. The parties may well be bound in another way, either by the existence of a customary rule on the same subject matter[270] or even because the same parties are bound by an earlier treaty to which a reservation signifies refusal of modification by the new treaty. When this is not the case, the State retains, in the field covered by the reservation, discretionary power, whereas it would have been bound by the implementation of the treaty.[271]

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[265] See para. 168 above.

[266] It is obvious that a State would not be able to exclude a territory from the scope *ratione loci* of a treaty after the treaty has become applicable to the territory.

[267] See, for example, footnote 259 above.

[268] The effect of reservations relating to non-recognition is to render all of the treaty's provisions inoperative in relations between the reserving State and the non-recognized State; conversely, territorial reservations may be either general or specific.

[269] It maintains, but does not restore. The treaty has not entered into force for it, since the reservation is made at the time it expresses consent to be bound.

[270] "It will ... be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content" (*Judgment of 27 June 1986, Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 96).

[271] On the conflict between these two notions in international law, see, above all, Stevan Jovanovic, *Les restrictions des compétences discrétionnaires des États* (Paris, Pédone, 1988), 240 p.

193. A traditional example of reservations intended to exclude the legal effect of certain provisions of the treaty in their application to the reserving State is to be found in the reservations to dispute settlement clauses, such as the reservations made by the Eastern European countries to article IX of the 1948 Genocide Convention, which establishes the competence of the International Court of Justice to settle disputes relating to the interpretation and application of that Convention,[272] and to article XII authorizing the exclusion of Non-Self-Governing Territories from the scope of the Convention, which led to the request for the Court's advisory opinion of 28 May 1951.[273]

194. Reservations of this type, clearly excluding the application of one or more provisions[274] of the treaty, are extremely frequent. Their interpretation and application generally[275] do not give rise to particular problems, regardless of the reasons on which they were based.[276]

195. The reservation may also purport to exclude the legal effect of the treaty or some of its provisions either in certain circumstances or on certain categories of persons or activities.

196. One example of the first category of such "exclusion" reservations is to be found in the reservations by most States parties to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, under the terms of which the instrument

> "... will automatically cease to be binding on the Government [of the reserving State] in respect of any hostile State whose armed forces or allies fail to respect the prohibitions that form the subject of this Protocol".[277]

Similarly,[278] it will be noted that the reservation formulated by the French Government on 14 February 1939 to the General Act of Arbitration of 26 September 1928 to the effect that "in future that accession shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved".

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[272] Most of these States have withdrawn the reservation, but Albania, Algeria, Bahrain, India, Malaysia, Morocco, Philippines, Poland, Romania, Rwanda, Singapore, Spain, the United States of America, Venezuela, Viet Nam and Yemen still maintained it as at 31 December 1996 (see *Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1997*, chap. IV.1, pp. 86-88).

[273] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 15.

[274] The provision in question may consist of one word; see, for example, Portugal's reservation to article 6 of the Convention on the Status of NATO ("The premises of the Organisation shall be inviolable. Its property and assets, wheresoever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation or any other form of interference"). Portugal agreed to the article "provided the provisions of article 6 are not applicable in a case of expropriation" (example cited by P.-H. Imbert, *op. cit.*, p. 234).

[275] See, however, in paras. 220 ff. below, the discussions to which reservations of the kind made to article XII of the Genocide Convention give rise.

[276] P.-H. Imbert deals separately with exclusionary reservations based on a concern to ensure that the internal law of the reserving State prevails (*ibid.*, pp. 234-235). Regardless of the reason, if the State purely and simply rejects the application of a provision of the treaty, it is quite clearly an exclusionary reservation. The situation might well differ if the State does not exclude application of the provision(s) to which the reservation relates, but intends to limit their effect; in this case, it is more of a modifying reservation (see para. 200 below), but this distinction has no bearing on the *definition* of reservations.

[277] P.-H. Imbert, *op. cit.*, p. 236.

[278] *Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chap. II.29, p. 1006. Similar reservations to the General Act were also made by the United Kingdom (*ibid.*, p. 1003), Canada (*ibid.*, p. 1004) and New Zealand (*ibid.*, p. 1005).

197. As an example of this latter kind of exclusion reservation, mention might be made of the reservation whereby Guatemala:

> "... reserves the right:
>
> (1) To consider that the provisions of the Convention (Customs Convention relating to the Temporary Importation of Private Road Vehicles of 4 June 1954) apply solely to natural persons and not to legal persons and bodies corporate as provided in chapter I, article 1",[279]

and the reservation by which several countries exclude the application of certain provisions of the 1966 International Covenant on Civil and Political Rights to the military[280] or, for the exclusion of certain categories of activities, the reservation of Yugoslavia to the Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation of 15 March 1960, whereby that country:

> "(b) ... reserves the right to provide by law that the provisions of this Convention shall not apply on waterways reserved exclusively for its own shipping."[281]

f. Reservations purporting to modify the legal effect of the provisions of the treaty

198. Writers seem to attach great importance to the question whether a reservation excludes or modifies[282] the legal effect of the provisions of the treaty. These attempts at classification (which vary, moreover, from one writer to another) are nonetheless of limited interest for the purposes of a definition of reservations, for it matters little whether the unilateral statement excludes or modifies the effect of the provisions of the treaty. It must have an actual consequence for the application of the treaty.[283]

199. In support of this remark, it is enough to point out that "modifying reservations" are reservations which, without setting aside a provision of the treaty, have the effect of unilaterally modulating the treaty's object or the terms and conditions of its application. This may relate to the actual substance of the obligations stemming from the treaty or to their binding force.

200. The first sub-category of these "modifying reservations" is by far the largest, on the understanding that, in this case, the modulation of the effect of the treaty may be the result:

Either of the substitution by the reserving State of provisions of its internal law for provisions contained in the treaty, e.g.:

> "The Argentine Government states that the application of article 15, paragraph 2, of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in article 18 of the Argentine Constitution";[284]

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[279] Ibid., chap. XI.A.8, p. 431. See also in this respect the reservation by India (ibid.).

[280] See, in particular, the reservations by France (No. 3), the United Kingdom and Malta (No. 4), ibid., chap. IV.4, pp. 123-129.

[281] Ibid., chap. XII.3, p. 663. See also the reservation of the Russian Federation to the Convention on a Code of Conduct for Liner Conferences of 6 April 1974 (ibid., chap. XII.6, p. 672).

[282] See the lengthy development on the distinction by F. Horn, op. cit., pp. 80-87, and P.-H. Imbert, op. cit., pp. 233-238, in the two most comprehensive monographs on reservations since 1969.

[283] See paras. 147-150 above.

[284] "Interpretative declaration" by Argentina concerning the International Covenant on Civil and Political Rights, *Multilateral Treaties Deposited with the Secretary-General - Status as at 31 December 1996*, chap. IV.4, p. 121.

Or of the substitution of obligations stemming from other international instruments for provisions of the treaty to which the reservation is attached, e.g.:

> "Articles 19, 21 and 22 in conjunction with article 2, paragraph 1, of the Covenant shall be applied within the scope of article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms";[285]

Or again of a different formulation, devised for the occasion by the reserving State, regardless of any pre-existing rule, e.g.:

> "Article 14 (3) (d) of the Covenant shall be applied in such manner that it is for the court to decide whether an accused person held in custody has to appear in person at the hearing".[286]

201. An effort may also be made to modify the effects of the treaty not by modulating the treaty's object or the terms and conditions of its application, but by modulating the binding force of some of its provisions. This is the case whenever the reserving State, while not rejecting the objective in question, "softens" the strictness of its obligations by means of a reservation:

> "In relation to paragraph 2 (a), the principle of segregation is accepted as an objective to be achieved progressively";[287]

> "The provisions of articles 17 and 18 are recognized as recommendations only".[288]

This amounts to a changeover from "hard" obligations to "soft" obligations or, if one prefers, from obligations of result to obligations of conduct.[289, 290]

202. Although, for the purposes of the definition of reservations, it is not important to determine whether unilateral statements by States or international organizations parties to the treaty exclude or modify the effect of the provisions of the treaty to which they relate, it is essential to make sure that they are designed to produce a genuine legal effect; otherwise they would not be reservations, but interpretative declarations.[291] Yet this is not always evident.

203. For example, in the *Mer d'Iroise* case, the United Kingdom challenged the claim that France's third reservation to article 6 of the 1958 Geneva Convention on the Continental Shelf constituted a genuine reservation. It contended that it was in fact an interpretative declaration – "a mere advance notice by the French Government of the areas in which it considers 'special circumstances' to exist".[292]

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[285] Reservation No. 1 by Germany to the same Covenant, ibid., p. 124.

[286] Reservation No. 2 by Germany, *idem*.

[287] Reservation by Australia to article 10, ibid., p. 121.

[288] Reservation by Italy to the Convention relating to the Status of Stateless Persons of 28 September 1954, ibid., chap. V.3, p. 244.

[289] The Special Rapporteur does not use these expressions in the sense in which they appear in articles 20 and 21 of the draft articles on State responsibility adopted by the Commission on first reading (See the report of the International Law Commission on the work of its forty-eighth session, *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10*, p. 132) and which seems to him to be questionable in the extreme.

[290] On this point, see Frank Horn, op. cit., pp. 85-86. This writer includes reservations of this kind among "exclusionary" reservations.

[291] See para. 3 below.

[292] Arbitral award of 30 June 1977, case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, *UNRIAA*, vol. XVIII, para. 54, p. 39.

204. The reservation was worded as follows:

> "In the absence of a specific agreement, the French Government will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it
>
> [...]
>
> "– if it lies in areas where, in the Government's opinion, there are 'special circumstances' within the meaning of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville and the sea areas of the Straits of Dover and of the North Sea off the French coast."[293]

205. The Court rejected the British claim on this point. It noted that:

> "although the ... reservation doubtless has within it elements of interpretation, it also appears to constitute a specific condition imposed by the French Republic on its acceptance of the delimitation regime provided for in Article 6. The condition, according to its terms, appears to go beyond mere interpretation."[294]

Then, recalling the Vienna definition and stressing the fact that the latter is not limited to the exclusion or modification of *the provisions* of the treaty, but also covers their *legal effect*,[295] the Court stated:

> "This is precisely what appears to the Court to be the purport of the French third reservation and it, accordingly, concludes that this 'reservation' is to be considered a 'reservation' rather than an 'interpretative declaration'".[296]

206. Although the problem does not seem to have been raised so far, the qualification of some declarations made by international organizations at the time of the expression of their consent to be bound by a treaty may also give rise to controversy, particularly in the case of reservations on the division of competence between an organization and its member States.[297] It is extremely difficult to determine whether or not such declarations constitute reservations within the meaning of the Vienna Conventions. It nonetheless seems difficult to suggest guidelines that would remove uncertainty in a case of this kind, for everything depends on circumstances and on the actual wording of the declaration.[298]

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[293] Ibid., para. 33, p. 29.

[294] Ibid., para. 55, p. 40.

[295] See para. 164 above.

[296] Arbitral award of 30 June 1977, *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, *UNRIAA*, vol. XVIII, p. 40.

[297] See, for example, the declaration made by the European Community at the time of the signature of the United Nations Convention on Climate Change, *Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chap. XXVII.7, p. 940.

[298] The declaration by the European Community mentioned in the preceding note does not appear to be a reservation properly speaking. It indicates that "The European Economic Community and its Member States declare, for the purposes of clarity, that the inclusion of the European Community as well as its Member States in the lists in the Annexes to the Convention is without prejudice to the division of competence and responsibilities between the Community and its Member States, which is to be declared in accordance with article 22 (3) of the Convention", the legal effect of which is therefore not modified. However, the declaration made by the Community when signing the Montreal Protocol on Substances that Deplete the Ozone Layer could be interpreted as a genuine reservation ("In the light of article 2 8 of the Protocol, the Community wishes to state that its signature takes place on the assumption that all its member States will take the necessary steps to adhere to the Convention and to conclude the Protocol", ibid., chap. XXVII.2, p. 922). In substance, this is a "reservation under internal law", which is no different from those made by some federal States to preserve the competence of the Federation's member States (cf. the reservation of Switzerland to the European Convention on the Equivalence of

207. Without going into extensive detail and subject to the clarifications to be provided below with regard to the distinction between reservations and interpretative declarations, it does not appear possible to include further explanations in the Guide to Practice on the criteria contained in the Vienna definition.

g. The problem of "extensive" reservations

208. There is no doubt that the expression "to modify the legal effect of certain provisions of the treaty" refers to reservations which *limit* or *restrict* this effect and, at the same time, to the reserving State's obligations under the treaty "because 'restricting' is a way of 'modifying'".[299] And it is true, in this respect, that the amendments proposed during the Vienna Conference on the Law of Treaties[300] would not have added anything to the final text.[301]

209. If they had been adopted, however, they would have drawn attention to a serious ambiguity in the text as it stands. Theoretically, there are indeed three ways in which a State may seek to modify the legal effect of the provisions of a treaty by means of a unilateral statement:

The State making the statement may seek to minimize its obligations under the provisions of the treaty (and this is the purpose of all the reservations cited as examples above);

It may also accept additional obligations;

Lastly, it may seek to strengthen the obligations of the other States parties.

210. The last two categories of reservations are at times lumped together under the term "extensive reservations". For example, Ruda defines "extensive reservations" as "declarations or statements purporting to enlarge the obligations included in the treaty", and he includes "unilateral declarations whereby the State assumes obligations, without receiving anything in exchange, because the negotiations for the adoption of the treaty have already been closed".[302]

211. In all likelihood, it is a mixture of this kind that lies at the root of the discussion between two members of the Commission on the subject of the definition of reservations. During the discussion of the first report on reservations to treaties, Mr. Tomuschat emphasized that an important element was missing from the Vienna definition "namely, that, by virtue of a reservation, a State party could only reduce the scope of its obligations towards other States parties and under no circumstances unilaterally increase rights not set forth in the treaty".[303] Mr. Bowett questioned that assertion and, referring to the 1977 arbitral

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Diplomas Leading to Admission to Universities of 11 December 1953, which was included with that country's reply to the questionnaire: "The Swiss Federal Council declares the competence of the cantons in respect of education, as conferred on them by the Federal Constitution, and the autonomy of universities shall be reserved insofar as the application of this Convention is concerned."

[299] Frank Horn, op. cit., p. 80.

[300] The amendments proposed by Sweden (add [a comma and] the word "limit" after the word "exclude") and Viet Nam (add a comma and the words "to restrict" after the word "exclude" (Report of the Committee of the Whole on its work at the first session of the Conference, para. 35, A/CONF.39/14, United Nations Conference on the Law of Treaties, first and second sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, *Official Records*, Documents of the Conference, United Nations, New York, 1971, Sales No. E.70.V.5, p. 112).

[301] See Frank Horn, op. cit., p. 80.

[302] "Reservations to treaties", *Recueil des cours* ... 1975-III, vol. 146, p. 107.

[303] 20 June 1995, A/CN.4/SR.2401, p. 4.

award in the *Mer d'Iroise* case, pointed out that the French reservation in question,[304] "by allowing France not to apply the median line, but another boundary line based on the above-mentioned special circumstances ..., had in fact increased the rights of its author".[305]

212. This discussion seems to have been the result of a misunderstanding, which can be cleared up if care is taken to distinguish between the additional obligations which the author of the "reservation" wishes to assume and the *rights* that he is trying to acquire. This is the distinction proposed by Horn between "commissive declarations", by which the State making the declaration undertakes more than the treaty requires, and "extensive reservations proper", whereby "a State will strive to impose wider obligations on the other parties, assuming correspondingly wider rights for itself".[306]

h. Statements designed to increase the obligations of their author

213. Although, according to the same author, "it is highly unlikely that any State would declare its willingness to accept unilaterally obligations beyond the terms of the treaty",[307] such cases do arise. A famous example, which was given by Brierly in his first report on the law of treaties, is provided by the statement which South Africa made when it signed the General Agreement on Tariffs and Trade (GATT) in 1948: "As the article reserved against stipulates that the agreement 'shall not apply' as between parties which have not concluded tariff negotiations with each other and which do not consent to its application, the effect of the reservation is to enlarge rather than restrict the obligations of South Africa".[308] Manfred Lachs also relied on that example in asserting the existence of reservations in cases "where a reservation, instead of restricting, extended the obligations assumed by the party in question".[309]

214. The South African statement gave rise to considerable controversy:

Brierly, in keeping with his general definition of reservations,[310] regarded it as a "proposal of reservation", since it involved an "offer" made to the other parties which they had to accept for it to become a valid reservation;[311]

Lachs regarded it purely and simply as an example of an extensive reservation;[312]

Mr. Horn saw it as a mere declaration of intent without any legal significance;[313] and

Professor Imbert considered that "the statement of the South African Union could only have the effect of increasing the obligations of that State. *Accordingly*, it did not constitute a reservation, which would *necessarily* restrict the obligations under the treaty" because, as he stated categorically, "there are no 'extensive reservations'".[314]

215. The latter position appears justified, but for reasons that differ from those put forward by this author, which beg the question and do not find support in the Vienna definition.[315]

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[304] See para. 204.
[305] 20 June 1995, A/CN.4/SR.2401, p. 6.
[306] Frank Horn, op. cit., p. 90.
[307] *Idem*.
[308] *Yearbook ... 1950*, vol. II, p. 239.
[309] *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 142.
[310] See footnote 65 above (A/CN.4/491/Add.1).
[311] *Yearbook ... 1950*, vol. II, p. 239.
[312] *Yearbook ... 1962*, vol. I, 651st meeting, 25 May 1962, p. 159.
[313] Frank Horn, op. cit., p. 89.
[314] Pierre-Henri Imbert, op. cit., p. 15, emphasis added.
[315] Which point, incidentally, is challenged by P.-H. Imbert, see paras. 152-153 above.

If it is in fact right that one cannot speak of "commissive reservations" it is because this kind of statement cannot have the effect of modifying the legal effect of the treaty or of some of its provisions: they are undertakings which, though admittedly entered into at the time of expression of consent to be bound by the treaty, have no effect on that treaty. In other words, whereas reservations are "non-autonomous unilateral acts",[316] such statements impose autonomous obligations on their authors and constitute unilateral legal acts which are subject to the legal rules applicable to that type of instrument,[317] and not to the regime of reservations.

216. Obviously, it does not follow from this finding that such statements cannot be made. In accordance with the well-known dictum of the International Court of Justice:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. ... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding".[318]

But these statements are not reservations in that they are independent of the instrument constituted by the treaty, particularly because they can undoubtedly be formulated at any time.

217. This may be one of the reasons why these statements seem so unusual: as they are made outside the treaty context and they do not appear in collections of treaties or in the instruments that summarize treaty practice.[319] Nonetheless, it would probably be as well to explain in the Guide to Practice that they do not constitute reservations so as to dispel any ambiguity as to their legal regime.

> *Guide to Practice*
>
> *"1.1.5 A unilateral statement made by a State or an international organization by which that State or that organization undertakes commitments going beyond the obligations imposed on it by a treaty does not constitute a reservation [and is*

[316] See para. 124 above.

[317] In this connection, see J. M. Ruda, "Reservations to treaties", *Recueil des cours ... 1975-III*, vol. 146, p. 147.

[318] Judgement of 20 December 1974, *I.C.J. Reports 1974*, p. 267.

[319] Despite his efforts, the Special Rapporteur has not found any clear examples of this type of statements. They must be distinguished from certain reservations whereby a State reserves the right to apply its national law with the explanation that it goes further than the obligations under the treaty. For example, when ratifying the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Thailand pointed out that, as its drugs law "goes beyond the provisions of the Geneva Convention and the present Convention on certain points, the Thai Government reserves the right to apply its existing law" (*Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chap. VI.8, p. 269; in the same connection, see the declaration by Mexico, ibid. This is a case of an explanation given to a "reservation under internal law" (see paras. 198-199), which, in any event, does not give rise to rights for the other States parties (see in this connection the explanations given by F. Horn (op. cit., p. 89) on reservations comparable to the 1931 Drugs Convention).

governed by the rules applicable to unilateral legal acts][320]*, even if that statement is made at the time the State or international organization expresses its consent to be bound by the treaty."*

i. Reservations designed to increase the rights of their author

218. "Extensive reservations proper", namely, statements whereby a State seeks to increase not its own obligations, but those of other States parties to the treaty to which they relate,[321] give rise to entirely different problems which are also a source of much confusion.

219. In this case, a distinction should be made between three kinds of statement which are related only in appearance:

Statements which, because they are designed to exempt their author from certain obligations under the treaty, restrict, by correlation, the rights of the other contracting Parties;

Statements whereby a State (or as the case may be, an international organization) proclaims its own right to do or not to do something which is not provided for by the treaty;

Statements designed to impose new obligations, not provided for by the treaty, on the other parties to it.

220. Only the last mentioned category of statement deserves the name "extensive reservations" *stricto sensu*. To the Special Rapporteur's knowledge, there are no examples.[322] Professor Imbert takes the contrary view: according to him, "practice provides numerous examples of such statements and, in particular, statements whereby some States do not accept the terms of the article indicating that the Convention does not automatically apply to the colonial territories".[323] He considers, however, that they are not reservations, as they are designed to increase the obligations of the other contracting parties – a claim which, according to him, is "inadmissible; statements which could have such a result are in fact only statements of principle which are in no way binding on the other States parties".[324]

221. Though appealing (since it appears to comply with the principle whereby a State cannot impose obligations on another State against its will), this position is not self-evident. In point of fact, every reservation is designed to increase the rights of the reserving party and, conversely, to limit those of the other contracting parties. As Mr. Bowett pointed out in 1995,[325] by reserving its right not to apply the principle of equidistance provided for in article 6 of 1958 Convention on the Continental Shelf, France increased its rights and restricted those of the United Kingdom. It is probably not overstating the case to say that the many States which formulated a reservation to article XII of the Genocide Convention[326] have in fact done the same thing: they challenge a right conferred by the Convention on the administrating Powers and make it clear that they are not ready to enter into treaty relations

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[320] The Special Rapporteur is aware that the words in square brackets fall outside the actual context of the definitions that are the subject of this part of the Guide to Practice. Since, however, he will not have another opportunity to revert to statements of this kind (which, as they are not reservations, do not fall within the ambit of the topic), it seems to him that these words would probably be useful.

[321] See para. 213 above.

[322] See, however, para. 225 below.

[323] Pierre-Henri Imbert, op. cit., p. 16.

[324] *Idem*.

[325] See para. 211 above.

[326] See para. 193 above.

with them if the exercise of that right is claimed, it being for them to raise an objection if they do not mean to forgo it. There is nothing particularly novel in this as compared with exclusionary reservations. If a State rejects a compulsory settlement clause, for example, article IX of the 1948 Convention (in other words, a right created in favour of the other parties to bring it before the International Court of Justice), it also restricts the rights of those other States. Contrary to Mr. Imbert's view,[327] there is no reason why they would not be required to make an objection to such statements, whether they relate to article IX or to article XII of the Genocide Convention. In both cases, that would seem necessary to preserve their rights under the treaty and, in the specific case, several administrating Powers have done so.[328]

222. The same reasoning seems to hold true in the case of other reservations which are sometimes presented as "extensive reservations", such as, for example, the statement in which the German Democratic Republic indicated its intention to bear its share of the expenses of the Committee against Torture only so far as they arose from activities within its competence as recognized by the German Democratic Republic.[329] It is doubtful whether such a reservation is lawful,[330] but it is not because it would have the consequence of increasing the financial burden on the other parties that it should not be described as a reservation or that it would, by its nature, differ from the usual "modifying" reservations.

223. This seems to apply too in the case of another example of "extensive reservation" given by Professor Renata Szafarz: the reservations formulated by Poland and several "socialist countries" to article 9 of the Geneva Convention on the High Seas, under which "the rule expressed in article 9 [relating to the immunity of State vessels] applies to all ships owned or operated by a State",[331] would constitute "extensive reservations" because "the reserving State simply widens its rights (and not its obligations), increasing by the same token the obligations of its partners".[332] Once again, there is in fact nothing special about this: such a reservation "operates" like any modifying reservation. The State which formulates it modulates the rule laid down in the treaty[333] as it sees fit and it is up to its partners to accept it or not.

224. In actual fact, reservations that impose obligations on other States parties to the treaty to which they relate are extremely common[334] and, while they often give rise to objections and are probably sometimes unlawful, they are still covered by the law applicable to reservations and are treated as such by the co-contracting States. The error made by the authors who exclude "extensive reservations" from the general category of reservations stems from a mistaken basic assumption: they reason as though the treaty between the reserving State or international organization and its partners is necessarily in force, but that is not so. The reservation is *formulated* (or confirmed) at the time of expression of consent

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[327] Pierre-Henri Imbert, op. cit., p. 16.

[328] See *Multilateral Treaties Deposited with the Secretary-General - Status as at 31 December 1996*, chap. IV.1, pp. 89-91.

[329] See ibid., note 3, p. 196.

[330] Richard W. Edwards, Jr., "Reservations to treaties", *Michigan Journal of International Law*, 1989, pp. 392-393.

[331] *Multilateral Treaties Deposited with the Secretary-General - Status as at 31 December 1996*, p. 809.

[332] Renata Szafarz, loc. cit., pp. 295-296.

[333] See para. 8 above.

[334] See the examples given by Frank Horn (op. cit., pp. 94-95): reservations to the Vienna Convention on Diplomatic Relations which concerns certain immunities; reservations to the provisions of the Convention on the High Seas concerning the freedom to lay submarine cables and pipelines; and reservations to the Convention on the Territorial Sea relating to the right of innocent passage.

to be bound, but it produces its effects only after they have accepted it in one way or another.[335] Furthermore, it is self-evident that the State which formulates the reservations is bound to respect the rules of general international law. It may seek to divest one or more provisions in the treaty of effect, but, in so doing, it makes a renvoi to existing law "minus the treaty" (or "minus the relevant provisions"). In other words, it may seek to increase its rights *under the treaty* and/or to reduce those of its partners *under the treaty*, but it cannot "legislate" via reservations and the Vienna definition precludes this risk by stipulating that the author of the reservation must seek "to exclude or to modify the legal effect of certain provisions *of the treaty*" and not "of certain rules of general international law".

225. It is from that standpoint that doubts may arise whether another "reservation", about which much has been written,[336] has the nature of a genuine reservation, namely, the reservation of Israel to the provisions of the 1949 Conventions on the Red Cross emblems to which they wanted to add the shield of David. This doubt stems from the fact that this "reservation" is not designed to exclude or modify the effect of provisions *of* the treaties in question (which in fact remain unchanged), but to add a provision *to* those treaties.

226. No firm conclusions concerning the definition of reservations can automatically be drawn from the foregoing. At the same time, given the importance of the discussions on the existence and nature of "extensive reservations", it would seem difficult to say nothing about the matter in the Guide to Practice.

227. The main elements that emerge from the brief study above are as follows:

(a) It is not unusual for a unilateral declaration to aim at minimizing the obligations incumbent on its author under the treaty and, conversely, to reduce the rights of the other parties to treaties;

(b) Such a declaration should in principle be regarded as a reservation;

(c) Unless, instead of seeking to exclude or modify the provisions of the treaty, it amounts to adding one or more provisions that do not appear in it.

On this basis, the Guide to Practice might provide:

Guide to Practice

"1.1.6. A unilateral statement made by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty and by which its author intends to limit the obligations imposed on it by the treaty and the rights which the treaty creates for the other parties constitutes a reservation, unless it adds a new provision to the treaty."

4. "... however phrased or named ..."

228. It is abundantly clear from the Vienna definition that the wording or name of a unilateral statement which is designed to exclude or modify the legal effect of the treaty in its application to its author constitutes a reservation. "Thus, the test is not the

[335] See article 20 of the 1969 and 1986 Vienna Conventions; see also para. 124 above.

[336] Cf. Jean Pictet, *Les Conventions de Genève du 12 août 1949 – Commentaire*, Genève, vol. 1, pp. 330 and 341, and Frank Horn, op. cit., pp. 82-83 (who doubt whether it is a reservation), and Shabtai Rosenne, "The Red Cross, Red Crescent, Red Lion and Fund and the Red Shield of David", *Israel Yearbook on Human Rights*, 1975, pp. 9-54, and Pierre-Henri Imbert, op. cit., pp. 361-362 (who take the contrary view).

nomenclature, but the effects the statement purports to have".[337] Any nominalism is precluded. A reservation can be called a "statement" by its author,[338] but it is still a reservation if it also meets the criteria laid down in the Vienna Conventions.

229. The problems raised by the differentiation between unilateral statements which constitute reservations and those which do not are the subject of more detailed consideration in paragraph 3 below.

230. At this stage, it suffices to note that inter-State practice and jurisprudence refrain from any nominalism; they do not dwell on what to call the unilateral statements which States combine with their consent to be bound, but try to pinpoint the actual intentions as they emerge from the substance of the statement and even of the context in which it was made.

231. So far as jurisprudence is concerned, the most remarkable example of an interpretative declaration being reclassified as a reservation is probably provided by the judgement delivered by the European Court of Human Rights in the *Belilos* case. Switzerland accompanied its instrument ratifying the European Convention on Human Rights by a unilateral declaration which it entitled "interpretative declaration".[339] It nonetheless considered that it was a genuine reservation:

> "Together with the Commission and the Government, the Court recognizes the need to find out what the intention of the author of the declaration was.
>
> "[...]
>
> "To determine the legal nature of such a 'declaration', it is necessary to look beyond the title alone and to try to pinpoint the material content."[340]

232. The European Commission of Human Rights followed the same approach five years earlier in the *Temeltasch* case. On the basis of article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties[341] and agreeing

> "on this point, with the majority of doctrine, [it took the view] that, if a State formulates a statement and presents it as a condition of its consent to be bound by the Convention and as having the object of excluding or modifying the legal effect of

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[337] D. W. Bowett, "Reservations to non-restricted multilateral treaties" *British Yearbook of International Law*, 1976–1977, p. 68; see also Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, 9th ed., vol. I, *Peace* (London, Longman), p. 1241: "... a State cannot, therefore, avoid its unilateral statement constituting a reservation just by calling it something else". Doctrine subsequent to 1969 is unanimous on the matter, before that, it was more divided (see Kaye Holloway, *Modern Trends in Treaty Law – Constitutional Law, Reservations and the Three Modes of Legislation* (London, Stevens, 1967), p. 486).

[338] English is richer than French in this regard; cf. John King Gamble, Jr., "Reservations to multilateral treaties: a macroscopic view of State practice", *A.J.I.L.*, 1980, p. 374: "Thus, a reservation might be called a declaration, an understanding, a statement or reservation", the words "understanding" and "statement" have hardly any other translation in French than "*déclaration*". See also Lilly-Fucharipa-Behrmann, whose enumeration is even richer: "the designation of the statement as reservation, declaration, interpretative declaration, understanding, proviso or otherwise is irrelevant" ("The legal effects of reservations to multilateral treaties", *Austrian Review of International and European Law*), 1996, p. 72.

[339] See para. 114 above (A/CN.4/491/Add.2).

[340] Judgement of 29 April 1988, publications of the European Court of Human Rights, series A, vol. 132, paras. 48 and 49, pp. 23-24.

[341] See para. 117 above (A/CN.4/491/Add.2).

> certain of its provisions, such a statement, *however named*, must be assimilated to a reservation ..."[342]

233. On the other hand, the arbitration tribunal appointed to settle the Franco British dispute in the *Mer d'Iroise* case concerning the delimitation of the continental shelf carefully considered the United Kingdom argument that the third French reservation to article 6 of the 1958 Convention on the Continental Shelf was in fact no more than a mere interpretative declaration.[343]

234. The practice of States follows the same lines; when reacting to certain unilateral statements presented as being purely interpretative, they do not hesitate to proceed to reclassify them as reservations and to object to them.[344] Finland was particularly punctilious in this regard in its objections to the "reservations, understandings and declarations made by the United States of America" to the International Covenant on Civil and Political Rights.

> "It is recalled that under international treaty law, the name assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty."[345]

235. These few examples are amply sufficient to show that it is common in practice to undertake the reclassification for which the Vienna definition calls without any special difficulties arising with the definition of reservations themselves. It therefore does not seem to be necessary to amplify that definition in any way for the purpose of the Guide to Practice. On the other hand, it would probably be useful to try to draw normative conclusions from the foregoing review concerning the definition of what can be regarded as "the mirror image" of reservations, namely, interpretative declarations and, in that connection, to lay down criteria for the distinction.

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[342] Decision of 5 May 1982, European Commission of Human Rights, *Decisions and Reports*, April 1983, para. 73, pp. 130-131.

[343] Decision of 30 June 1977, *UNRIAA* XVIII, paras. 54 and 55, pp. 39-40. See para. 115 above.

[344] See, among the very numerous examples, the formula used by Japan, which stated that "it does not consider acceptable any unilateral statement *in whatever form*, made by a State upon signing, ratifying or acceding to the Convention on the Territorial Sea and the Contiguous Zone, which is intended to exclude or modify for such State legal effects of the provisions of the Convention" (*Multilateral Treaties Deposited with the Secretary-General - Status as at 31 December 1996*, chap. XXI.1, p. 804), the objections of Germany to "declarations to be qualified in substance as reservations" made by several States to the 1958 Convention on the High Seas (ibid., chap. XXI.1, p. 810), and the objections of a number of States to the (belated) "statements" by Egypt concerning the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (ibid., chap. XXVII.3, pp. 931-932).

[345] Ibid., chap. IV.4, p. 131; see also the objections of Sweden (ibid., p. 133).